No. 317.

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

CRITES, INCORPORATED,

Petitioner,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, AND GEORGE FLORENCE AND RICHARD SIMKINS,

Respondents.

BRIEF IN BEHALF OF RESPONDENTS.

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Cases and Authorities Cited.

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BRIEF IN BEHALF OF RESPONDENTS.

Respondents receivers are filing a cross-petition in this cause in which they are designated as petitioners. In this matter, an application was made by the receivers to this court for an extension of time to file a cross-petition and also to file an answer to the petition of Crites, Inc., and an extension was granted by one of the associate justices of this court until the fourth day of October, 1943.

CORRECTED STATEMENT OF FACTS.

There are some errors in petitioner's statement which should not be permitted to go by uncorrected. Having reference to petitioner's petition (p. 2) Crites would have this court believe that Simkins had engineered and maneuvered a contract for Prudential in advance of the sale.

The testimony of Simkins (R., 144-160), particularly on page 145 when Simkins testifies that Jones came to see him prior to the foreclosure sale and asked if it was possible to buy the farms as a single unit. "I told him that as receivers we had nothing to do with the sales." (R., 147.) "He told me that his party would only be interested if he could buy this land as a whole and he asked me if Prudential bought these farms in if I would assist him in closing the deal with the Prudential." Jones (R., 204-205) and particularly R., 206, "I went to see him and told him that he was an attorney in the matter and that I was interested in trying to buy the land and he told me that he was in no position to offer it to anybody right now, not until after the foreclosure and the Prudential acquired title to it and then that he would be in a position to offer it to anybody."

R., 238, will show that the actual cash received for the foreclosure was $249,106.00 instead of the $281,000.00 as alleged by petitioners on page three of its petition.

Petitioner on page three (3) alleges that Simkins had a fee-splitting arrangement with Ingalls and Harrison. The master (R., 91) states that there is no doubt that there was a mutual understanding between the parties referred to by which it was agreed that they should propose the

appointment as alleged, likewise there is no doubt that Ingalls and Simkins agreed to share their fees and pursuant to that agreement Ingalls did pay to Simkins a substantial sum from the pay received as the attorney for the Prudential, but there is no place where the master finds there was an agreement between the three of them to divide fees, and petitioner can not point to any place in the record where it shows that there was such an agreement, nor did the master make a finding that there was any division of fees arising out of the trust estate.

This subject is dealt with at length in respondents' cross-petition and supporting brief.

On page (4) of Crites petition it states that the District Court concluded as a matter of law that the conduct of the receiver, Simkins, was objectionable. We challenge the petitioner to produce from the record any evidence of any such conclusion made by the District Court.

The master (R., 91) states that it has been found that the receiver, Simkins, has not been guilty of any breach of trust or misconduct which would justify the charge of objectionable conduct against the receiver.

And the District Court confirmed the master's report, denied the exceptions and approved the receivers accounts, which is the best evidence that the District Court did not say that the conduct of Simkins was objectionable.

ARGUMENT.

Number one question presented by the petitioners petition (page 5) is misleading. The proper question based upon the facts shown by the record is as follows:

May one of the two co-receivers in a foreclosure proceeding, this co-receiver being an attorney, with impunity while acting as such receiver for the collection of rents and profits only, accept legal employment from a real estate agent who is intent upon purchasing the real estate in question from the Prudential Insurance Company of America, the mortgagee, who becomes the purchaser at the marshal's sale; and could said attorney co-receiver accept compensation from this real estate agent without notifying the court, his co-receiver and appellant? The lower courts answered yes. The appellant contends that it should be answered no.

The answer to this question is found in special master's report (R., 78-89).

The Circuit Court of Appeals of the Sixth Circuit found that

> "the receiver was a fiduciary and in situations like the present a trustee, whose obligations extend not only to the mortgagee but likewise to the mortgagor or others interested, and that a fiduciary may not purchase or be interested in the purchase of property for his own benefit against the claims of his beneficiary and that no one can be both buyer and seller in the same transaction, but says that the rule is subject, however, to this modification,—that where the sale of trust property is made pursuant to a decree of the court, by a special commissioner or other agent appointed by the court, the fiduciary has the right and privilege of purchasing. In such cases the reason for the rule, to wit: a conflict between personal interests

and fiduciary duties of the trustee, is absent, so the rule does not apply."

"It will be observed that the present receivers were limited in authority and so in obligation. By the terms of their appointment they were authorized to collect the rents and profits from the farms and to operate and manage them; that they had no authority to dispose of the real estate; had nothing to do with bringing about the sale and no control over the manner in which it was carried on. They were not in any sense liquidating receivers. Simkins did not stand, in respect to the mortgaged property, in the petition of both buyer and seller, nor was anything done by him or those with whom he was associated, to stifle bidding at the sale. It is perfectly clear upon the record that Proctor was not at any time a prospective bidder. Under the decrees, the farms could only be sold separately. Proctor was interested only in the Madison county acreage as a single parcel, and in its purchase only if he could obtain a warranty deed from Prudential. For this he was able and willing to pay. The knowledge of Proctor's interest in the property withheld from Crites could have been of no value to it if disclosed."

The Supreme Court has consistently sustained the findings of the lower court in this matter in well considered opinions.

Twin Lick Oil Co. v. Marbury, 91 U. S., 587;
Allen v. Gillette, 127 U. S., 589;
Pewabic Mining Co. v. Mason, 145 U. S., 349;
Starkweather v. Jenner, 216 U. S., 524.

The most interesting state case is Reeves v. Crum, 97 Okla., 293, 225 P., 177. This case very minutely differentiates Jackson v. Smith, 254 U. S., 586.

The Supreme Court citations above answer Crites second question (p. 6).

The third question (p. 6) is "Is a receiver entitled to compensation as a receiver where he has entered into a

secret agreement with plaintiff's attorney in advance for a division of all fees that might be received?" Crites in its petition said Simkins had fee-splitting arrangements with Ingalls and Harrison but in this question number three, it says plaintiff's attorney and evidently Ingalls is meant.

The master did not recommend disallowance of a reasonable fee to Ingalls and the District Court did, later on, with full knowledge, make allowance of twenty-two hundred ($2200.00) dollars.

The testimony in the record (R., 407) is that Ingalls was approached by Simkins and asked to join with Harrison as counsel for the Prudential and asked one-half of the fees paid by the Prudential as a division between forwarder and receiver. So one-half of the fees paid by the Prudential for the bringing of the action was paid to Simkins. There was no other division of money coming out of the trust, or otherwise, nor any attempts or suggestions of division of such funds appearing in the record.

(R., 116.) (R., 143.) The best evidence that there was no general agreement to divide fees arising out of the trust estate as found by the Circuit Court of Appeals is brought out by the following:

Simkins in April, 1934, drew a fee of eighteen hundred ($1800.00) dollars as receiver which Ingalls knew nothing about until December, 1935 (R., 116), and Harrison (R., 230), who was present in April, 1934, when the fees were paid to the receivers would naturally have seen to it that Ingalls and himself were paid attorney fees if there had been a general agreement to divide fees.

Furthermore, if there had been an agreement to divide fees between the three, Harrison would not have on June 7, 1937 (R., 125) and (R., 264) in behalf of the Prudential

have filed objections to Ingalls' application for fees. If Ingalls were to have divided fees out of the receivership estate with Simkins, Simkins would have seen to it that Ingalls was paid a counsel fee at the same time he drew eighteen hundred ($1800.00) dollars.

Harrison drew two hundred fifty ($250.00) dollars in fees and made no further application so it can be assumed that he was paid by the Prudential. There was no demand by Harrison or Simkins upon Ingalls to divide the twenty-two hundred ($2200.00) dollars that was ordered by the lower court in 1940.

In fact, the entire record absolutely disproves that there was a general agreement other than the agreement betwen Ingalls and Simkins to divide fees paid by the Prudential, which agreement in no sense invaded the authority of the court to fix the fees of the receivers and counsel, which practice was found objectionable in the case of Weil v. Neary, 278 U. S., 160, cited by the Circuit Court of Appeals as its authority for the refusal to allow further counsel fees. In the Weil case there was a contract between the attorney for the trustee and Untermeyer, attorney for the creditor, whereby the compensation to be allowed the attorney for the trustee and the work done should be performed under Untermeyer's supervision, which, of course, was contrary to public policy and professional ethics. This agreement was void under Rule 42 of the Bankruptcy Act as well.

Corpus Juris Secundum, Volume 7, page 1034, says that it is not unethical or illegal for one attorney to divide fees with another attorney except where the agreement is against public policy and in bankruptcy agreements.

In the instant case, the agreement between Ingalls and Simkins did not invade the authority of the court to fix

the fees, and the court will observe that there was no division whatsoever of fees coming out of the trust estate.

The Circuit Court of Appeals in its decision (R., 393) cited Woods v. City National Bank, 312 U. S., 262. This is another bankruptcy case where the division of fees was made between counsel who were hostile and represented conflicting interests. The court in that case says that those expenditures should be allowed which had clearly benefited the estate.

Now of the courts, which is the better one to determine whether or not counsel have violated the proprieties and determine whether or not there has been divided allegiance and fee-splitting which invaded the authority of the court to fix the fees? Our contention is that the master and lower court who have the opportunity to hear and observe the witnesses.

This court in Trustee v. Greenough, 25 U. S., 527, 537, where this subject is discussed, has stated that the action of the court below in this respect is treated as presumably correct.

Now, the lower court, in 1940, heard an application for compensation by O. C. Ingalls for services rendered up to May 25, 1939, and after a hearing in open court, the only opposition was made by Crites, Inc., the District Court with full knowledge of the so-called divided allegiance and fee-splitting, allowed Ingalls twenty-two hundred ($2200.00) dollars compensation up to that date.

In the hearing upon Ingalls' fees (R., 403-404) Crites when asked by the court stated that their objection to the allowance of Ingalls' fee was because most of his time had been spent in defending the receivers' accounts against exceptions filed. (R., 404.) The court specifically asked In-

galls if he had participated in any manner with Simkins and Ingalls said he had not.

The master did not find fee-splitting reprehensible as stated by the Circuit Court of Appeals, although he did say that Judge Hough had no knowledge or information as to the fee-splitting arrangement and to that extent was imposed upon (R., 92).

Judge Hough allowed a fee of two hundred fifty ($250.00) dollars which was allowed to stand by the Circuit Court of Appeals. The Circuit Court of Appeals admitted (R., 393) that Judge Hough knew of the dual allegiance when he allowed the two hundred fifty ($250.00) dollars fee but did not know of the fee-splitting arrangements and we contend that there is nothing in the record to show that he did not know of the fee-splitting arrangement and there is no just assumption on the part of the master (R., 92) that Judge Hough was not advised of the agreement.

The only place in the record where that has been discussed was (R., 280) when Simkins was asked if he had told the court about the division of fees with anyone and he answered "No, I don't think so."

The statement made in petitioners supporting brief (p. 13) that the court below found the fee-division reprehensible is untrue. The court simply approved the receivers' accounts and made no comment concerning the fee-splitting arrangement.

CONCLUSION.

The master who heard the testimony (R., 89) found that Simkins was not guilty of breach of conduct or trust which could bar him from reasonable compensation for his services.

The lower court allowed receivers fees for services and approved their accounts and the Circuit Court of Appeals found no merit in other exceptions to the receivers accounts save to the allowance of attorney fees which they disallowed.

They found the itemization for traveling expenses and stenographic fees appearing reasonable and have the sanction of consent of the master and the judge.

They failed to show any fraud or connivance in the operations of the receivers and sustained the opinion of the lower court, and therefore we urge that the petition for certiorari on behalf of Crites, Incorporated, be disallowed and that the cross-petition of the receivers be allowed.

Respectfully submitted,

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